United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1394

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FLORIAN KAZMIERCZAK,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF-APPELLEE

UNITED STATES COURT OF APPEALS
FILED
NOV 1976
SECOND CIRCUIT

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
302 United States Courthouse,
Buffalo, New York 14202.

ROGER P. WILLIAMS,
Assistant United States Attorney,
of Counsel.

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Preliminary Statement

On April 12, 1973, a three count indictment was returned to the Court charging the defendant with a violation of Title 26, United States Code, Section 7201 for the calendar years 1966, 1967 and 1968 (6-9)[1]. After all pre-trial motions were completed, a jury was selected on February 6, 1976 and proof commenced on February 11. On February 19, 1976 the jury returned a verdict of not guilty on Count I and guilty on Counts II and III of the indictment (4, 275).

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[1] All references are to the Appendix unless otherwise indicated.

The defendant then timely moved, post verdict, for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and, in the alternative, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure (5). On July 2, 1976, Judge Curtin denied both motions (277-287) and on August 11, 1976 the court sentenced Kazmierczak to a fine of $1,000 on Counts II and III (288). His notice of appeal was timely filed.

Statement of Facts

A good portion of the proof adduced during the trial was in the form of a stipulation entered into by and between the parties (Gov. Ex. 10, 289-296). The balance of the proof was in the form of the tax returns, records of the defendant and the live testimony of Michael Pasquarella, Special Agent, Internal Revenue Service, and Dolores Tramont, daughter of the defendant.

Pasquarella testified that he was assigned to investigate Kazmierczak relative to an understatement of income for the years 1965-1968 (11, 15). His first conversation with Kazmierczak took place at the taxpayer's place of business, a delicatessen located at 977 Sycamore Street, Buffalo, New York on October 7, 1969 (11). There, Pasquarella told him that he was assigned to investigate his tax liability for the years 1965 through 1968. He further informed Kazmierczak that according to an audit which had been made, there was a tentative understatement of income for each of the years and that it was his purpose to conduct an investigation to determine whether or not that understatement of income was willful. Then, prior to asking any questions, Pasquarella fully advised Kazmierczak of his rights pursuant to *Miranda* (12-13).

According to Pasquarella, Kazmierczak said that his only sources of income were from his delicatessen business, some bank interest and dividends (14-15). The agent then related that Kazmierczak told him that his 1966 and 1967 tax returns were prepared by M. Kuzczko and his 1968 return by Joseph Ciapkcek (17). Both preparers were deceased at the time of trial (18).

The agent went on to say that Kazmericzak told him that it was his practice to cash checks for customers, both personal and payroll and also to accept for payment utility bills, all free of charge (19). Before leaving that day, Kazmierczak also told Pasquarella that he gave his wife $90 in cash each week to be used for personal and household expenses (23) and that he was the only person who ever made entries in both his gross receipts book (Gov. Ex. 11) and his expense book (Gov. Ex. 12, 25).

Pasquarella then saw the taxpayer on the following day simply to pick up some records, his next conversation with him being on October 24, 1969 (29). At that time Kazmierczak explained to the agent how he reported his gross receipts. He said that at the end of the day he would count the money in the cash register, subtract what he had started with to make change and that that would be the figure that he would enter into his gross receipts book. Pasquarella then asked Kazmierczak to explain how he handled the cashing of checks and the payment of business expenses. Kazmierczak said that, for example, if an individual came in with a $50 payroll check, he would take the check, place it in his cash box where he constantly maintained $1,500 cash on hand, remove $50 cash for the customer, and, at the end of the day, he would take the $50 cash out of the cash register and place it back in the cash box to maintain a $1,500 balance (30).

Pasquarella then asked Kazmierczak what he would do in a situation where a vendor submitted to him a bill for $50 for goods delivered. Kazmierczak responded by saying that he would take $50 out of the cash box and at the end of the day he would take $50 out of his cash register and put it back in the cash box to maintain his $1,500 cash on hand (30). Kazmierczak then said that whatever cash he received from his business was used by him to pay business expenses, payroll expenses and personal expenses in the form of $90 a week to his wife (31).

Kazmierczak then said that all the checks that he took in during the course of the day and all moneys that he took in as payment for utility bills together with all cash items would be deposited in his checking account (35). Lastly, Pasquarella asked him if he had any explanation for his tentative understatement of income and specifically asked him if there were other expenses that the Internal Revenue Service might not be aware of. Kazmierczak said no, that all his expenses are recorded in the book and there would be no other expenses (35).

Dolores Tramont testified that she is the defendant's daughter and that during the years 1966 through 1968 she oversaw the operation of the store during periods of time when her parents were on vacation, usually a period of two or three weeks during the month of February (117-119). She said that during such periods of time she took care of the cash box, paid the help, and paid the vendors in cash or by check (118-119). She also said that her father instructed her to charge each customer a fee of ten cents for cashing payroll checks or accepting payment of a utility bill (125-126). She further testified that during those periods when she was

responsible for the operation of the store she entered the gross receipts for each day in a little shorthand notebook or a stenographer's notebook (Gov. Ex. 15, 127). She said that on the occasions when she made such entries she sometimes saw earlier entries made in her father's hand (126-129).

She also testified that while she always made entries into the bound expense journal during the periods of time that she operated the store (Gov. Ex. 12, 130), she never made entries into the bound gross receipts book (Gov. Ex. 11, 129). In this regard, she said that she did not make the entries into the bound book because, "The man who did the taxes had it at that time." (129). However, at a later point she testified that during those same periods of time she saw such a gross receipts book lying around the store (158). Her testimony that the green bound cash receipts journal was available in the store seems to be supported by the tax returns themselves. Kazmierczak's tax return for 1967 (Gov. Ex. 4), was signed by the preparer on January 31, 1968; his return for the year 1966 was signed by the preparer on February 5, 1967; and his return for the year 1967 was signed by the preparer on January 27, 1969 (154-165).

Regarding the cash register, she testified that every time she rang up a sale the sale was recorded on a spindle of numbers and, if at any time she wanted to know what the sales were, she simply looked at the spindle which would tell her what the tape was for the day (143). She also testified that, in paying vendors, she sometimes took the money out of the cash register, sometimes from the cash box and sometimes from the utility tray (T. 137-139)[2]. She also testified that when she

[2] Reference to trial testimony of Delores Tramont.

cashed payroll checks for the customers she would sometimes take the money out of the cash register, and sometimes out of the cash box (147) and she sometimes paid employees with moneys taken from the cash register (T. 149). However, she further testified that at the end of the day, in determining the take for the day, she would count the money in the register and if there was a difference in the money count and the total sales that appeared on the cash register spindle, the money in the cash register would win out (144).

ARGUMENT

POINT I

The evidence was sufficient to sustain the jury's verdict.

Kazmierczak claims that the evidence adduced at trial was insufficient to sustain the jury's verdict on Counts II and III of the indictment. Of course, the standard to be applied is, whether in viewing the evidence presented in a light most favorable to the government, a reasonable juror could reasonably conclude guilt beyond a reasonable doubt. *United States v. Brawer*, 482 F.2d 117 (2d Cir. 1973); *United States v. Fahey*, 510 F.2d 302 (2d Cir. 1974).

To sustain a conviction for the willful attempt to evade taxes, three essential elements are required to be proved: (1) the fact that a substantial additional amount of federal income tax was due and owing from the defendant for the calendar years 1967 and 1968, over and above the amount of the tax which he declared or disclosed in his return for those years; (2) knowledge of the defendant that some additional

federal income tax of a substantial amount was due and owing by him to the government for the years 1967 and 1968 over and above the amount which he disclosed; and (3) the fact that he willfully attempted, in some manner, to evade or defeat such additional tax, with the specific intent to defraud the government of such additional tax.

The stipulation entered into by the parties (Gov. Ex. 10, 289-296) is certainly ample evidence of the first element. For the year 1967, Kazmierczak claimed a tax due and owing in the amount of $631.02 (Gov. Ex. 4), whereas he admitted, per stipulation, that there was an additional tax due and owing in the sum of $3,811.17. In the year 1968, the defendant claimed, on his tax return, a tax due and owing of $602.79 (Gov. Ex. 6), whereas he admitted, per stipulation, to an additional tax due and owing in the amount of $1,813.63. The jury could certainly reasonably find that in each of these two years the additional tax due and owing was substantial. Additionally, the jury could also reasonably find that the defendant had knowledge that a substantial additional tax was due and owing. As defense counsel so oft-times stated during the course of the trial, and as reflected in paragraph 15 of the stipulation (294), the defendant supplied the IRS with all the information needed in order to compute the additional income and the additional tax liability. In other words, simply based upon Kazmierczak's checking account and the records relating thereto and his bank accounts, the Internal Revenue Service was able to construct the actual income of the defendant. Here again, those sums were substantial (291). In that stipulation Kazmierczak admitted that in 1967 he had an actual taxable income in the amount of $21,220.01 whereas he reported on his return the sum of $4,057.99. In 1968 he admitted to a taxable income of $12,175.49 whereas he reported on his return the sum of $3,657.56.

During the course of the trial the government, among other things, showed that the defendant expended in cash personal expenses a sum, $4,680.00 ($90 per week x 52), greater than that which he reported as taxable income for each of the two years, 1967 and 1968. Since all of Kazmierczak's income was either deposited in his checking account or in his savings account, and in view of the fact that his actual income for 1967 was approximately five times greater than he reported and in 1968 four times greater than reported, the jury could reasonably find that he knew he had much greater income, and, therefore, a much greater tax liability owed to the government.

It is with respect to the third element—willfulness—that Kazmierczak makes his challenge. While the government agrees that willfulness cannot be inferred by the mere understatement of income alone, a consistent pattern of underreporting and failure by a defendant to include all his income is enough. *Holland v. United States*, 348 U.S. 121, 139; *United States v. Schwartz*, 213 F.Supp. 306 (E.D.Pa. 1963), rev'd other grounds, 325 F.2d 355 (1964). Further, a consistent pattern of such under reporting including years for which the defendant has been acquitted, here 1966, is in itself evidence of willfulness. *United States v. Coblentz*, 453 F.2d 503, 505 (2d Cir. 1972), *cert. denied* 406 U.S. 917. Additionally, the filing of an income tax return with *knowledge* [emphasis added] that more income should have been reported is enough for a finding of willful intent to defeat and evade taxes. *Sansone v. United States*, 380 U.S. 343, 351-353; *United States v. Fahey*, *supra*, at 306. Here, the filing of the return with that knowledge is an act sufficient to constitute an act evidencing an attempt to evade or defeat the tax.

The jury, in addition to finding that the defendant substantially understated his income and filed his returns for the two years in question with knowledge that more income should have been reported, could also have found that the defendant maintained a double set of books. See *Spies v. United States*, 317 U.S. 492. In this regard, Dolores Tramont testified that, while she was responsible for the operation of the store, she recorded daily gross receipts in a shorthand notebook (127). She did this desipte the fact that she saw the green bound gross receipts book lying around the store (158). At another point she testified that she never saw the permanent gross receipts book during the period of time that she operated the store because it was with the tax preparer (129). The jury could have easily resolved this conflict by finding that the green bound gross receipts journal was available. In addition to her testimony, initially, that it was, the returns were signed by the preparer on February 5, 1967, January 31, 1968 and January 27, 1969, respectively (154-165). It is reasonable to infer that the preparer would not have kept those gross receipts books after he had signed the return as preparer. Indeed, the government argued to the jury that after that time, the permanent green bound gross receipts journal would have been returned to the store and that was supported by Tramont's testimony that she, indeed, saw the book lying in the store. In addition, since the substantially greater income discovered by the Internal Revenue Service was found simply from the defendant's checking account records and savings account records, the jury could reasonably infer that the difference was attributable to the fact that Kazmierczak kept a double set of gross receipts books; that he entered one figure in the temporary receipt book and a much lower figure in the permanent gross receipts book. Here again, Tramont

testified that she made gross receipts entries each day in a little notebook and that, on occasions, she saw prior entries which were made by her father (128-129, 162).

Further, the jury could have reasonably found yet another act sufficient as an act to evade or defeat, namely that Kazmierczak recorded as his gross receipts the amount of money left in his cash register at the end of the day as opposed to his total sales for the day. In this regard, Mrs. Tramont testified that the store was equipped with an electric cash register which had a spindle that added up the total sales for the day and that at any time she wanted to get a total of the sales, she simply looked at the numbers on the spindle (143, T. 177, T. 179). However, she also testified that the money in the register and the total sales on the spindle were not always the same and, in any event, the amount of the money in the cash register at the end of the day was the amount of the money that was taken as gross receipts (144). The reason for that also comes from her testimony. She testified that, during the course of the day, she would pay the help, pay vendors and cash payroll checks (118-119) and that sometimes the moneys for these were taken out of the cash register, sometimes the cash drawer, sometimes a utility tray (T. 139). From this, the jury could infer that the defendant, following the same procedures, knowingly made entries in his gross receipts book reflecting figures much lower than the actual day's take. That is, that he knew that the actual day's take was the figure recorded on the cash register spindle and not the amount of money that may have been left in the cash register drawer.

The trial court, in its well considered Decision and Order found that there was sufficient evidence so that a reasonable juror could reasonably conclude guilt beyond a reasonable doubt (278-280).

POINT II

The trial court did not abuse its discretion in the curtailment of certain aspects of defendant's cross-examination.

Kazmierczak next claims that he was improperly foreclosed on cross-examination that the court's comment on some of his cross-examination being "window dressing" was prejudicial. At the point Judge Curtin first interrupted defense counsel he had gone on and on, without objection, (50-79) questioning the agent extensively about what steps he took to prepare for the interview of the defendant, what records he consulted, what his training was beforehand, whether he made an outline of the questions to be asked of the defendant, his understanding of the Memorandum of Instructions given to agents, what his contacts were with the Revenue Agent before the interview, how he made notes during the interview, what happened to the notes after the interview, whether he had any training in the use of weapons, what other training he received, whether or not he had the ability to take affidavits, among other things. At this point the court said (72):

> Mr. Condon, the agent can do many things. If we were here and questioned him about all the things he didn't do, we would be here a long, long, long time and not develop any information which would be useful, so let us zero in, please, on what he did do.

Defense counsel then continued by asking the agent whether or not he knew Mrs. Kazmierczak had returned from the hospital, was confined to bed because she was to ill by virtue of the fact that she had an asthma attack (82). Counsel then asked the agent whether or not he know that willfulness

meant "something that was unjustifiable, without excuse, stubbornly and obstinately and perversely made?" (87). At that point the court again interrupted and said that that was a question of law and that his questions were becoming "window dressing" (87).

Despite all this, counsel continued asking questions about what the agent did not do. He asked him whether or not he made any inquiries to determine whether or not the cash register was properly functioning (91); whether or not he made any inquiry as to where the sales tax moneys were kept (92); whether he performed any surveillance; whether or not he made an inquiry to determine if there were shoplifters in the area; and whether or not he made an inquiry to determine the number of industrial plants (92-93).

It is axiomatic that the purpose of cross-examination is to test the truth of the statements of the witness made on direct. To this end, it may be used directly to breakdown the testimony in chief, to effect the credibility of the witness, or to show bias or motive to lie. See *Alford v. United States*, 282 U.S. 687 (1931); *Marton v. United States*, 107 F.2d 834 (2d Cir. 1939), *cert. denied* 309 U.S. 664 (1939). Also, it is within the trial judge's discretion to confine the scope of cross-examination to the subject matter of the examination in chief. And, unless there is an abuse of that discretion, there is no prejudicial error. See *United States v. Dardi*, 330 F.2d 316, 333 (2d Cir. 1964), *cert. denied* 379 U.S. 845. At the point the court interrupted, the whole background and motive of the agent had been thoroughly explored and the line of questioning was getting to matters collateral and irrelevant, even as to the witness's credibility.

A similar issue arose in the case of *United States v. Lehman*, 468 F.2d 93, 105 (7th Cir. 1972), rehearing denied, *cert. denied* 93 S.Ct. 273. In that tax evasion case, the defense counsel sought to pursue a line of questioning showing that the agent had an impure motive and was trying to deceive the defendant during the course of his interview with him. There, the court said that what was pertinent material [on the cross-examination] was what was said and done by the agents at the time of the interview and not what was on his mind or what he could have done. The Appellate Court there specifically stated that: "The District Court properly restricted the testimony to what was said and done." At 106. So here, the trial court's admonition to defense counsel to move on a stick to questions relating to what Pasquarella said and did was proper.

Defense counsel was forewarned by the court not to continue asking questions about what could have been done but to move on and ask questions about what in fact was done (72). Counsel then continued inquiring whether or not the agent knew of Mrs. Kazmierczak's condition (81-82) and then asked the agent if he knew what willfulness means something to be unjustifiable, without excuse, stubbornly and obstinately and perversely made (87). It was with regard to these questions that the court said such questions were "window dressing."

First, defense counsel brought this upon himself. Secondly, one such comment during the course of the entire trial cannot be considered to be prejudicial. Certainly the trial court had wide discretion as to what collateral evidence is admissible. Clearly, these questions asked by defense counsel were in this category. See *United States v. Schwartz, supra; Mims v. United States*, 254 F.2d 654 (9th Cir. 1958).

Again, Judge Curtin in his July 2, 1976 Decision and Order found no improper prejudice to the defendant (280-284).

POINT III

Comments of the prosecutor were not so prejudicial as to require a new trial.

Here, Kazmierczak makes two points. First, that in summation the prosecutor, commenting upon the testimony of Dolores Tramont, said that she testified that, "many times she saw entries in there [stenographer's notebook or shorthand notebook] prior to the entries that she made. She saw entries, her father's entries that were in there prior to the time that she made entries." (179-180). In her testimony, she initially said that she observed earlier entries made by her father in that stenographer's notebook (Gov. Ex. 15, 127-129). To be fair, she did later testify that she may have seen those entries only once, but maybe more than once (162). Second, Kazmierczak claims that certain comments made by the prosecutor in summation regarding Agent Tony amounted to an offer of facts not in evidence and constituted a statement of beliefs that the jury was expected to understand came from the prosecutor's personal knowledge.

On the first point, court's have consistently held that whether or not such comments deny a defendant due process depends on whether or not the comments were slight, rather than persistent and pronounced such as to have a probable accumulative effect on the jury which cannot be disregarded as inconsequential. Here, the comment was slight and not aggravating. In fact, after the prosecutor's initial comment of

"many times", he immediately followed by saying she saw entries prior to the time that she made entries.

On the second point, the complained of comment of the prosecutor was made in rebuttal following defense counsel's summation wherein defense counsel stated (219):

> Gee, wouldn't it be great if we had Mrs. Tony. When Mrs. Tony could get right up there and say, 'yes sir, that's exactly the way it is, everything that Special Agent Pasquarella says is right on the money, he hasn't missed a point.'

In addition, defense counsel on cross-examination of Agent Pasquarella asked him if it wasn't so that Mrs. Tony had gone through the same computations as he (85). With that background the prosecutor responded in rebuttal summation by saying (239-240):

> Now, the government is not obligated to call every possible and conceivable witness that may have some information and Mr. Condon is right, there is no question we didn't call Mrs. Tony and Mr. Pasquarella said that Mrs. Tony was there on, I think it was October 7th when he saw him and she was there again on October 24th and as Mr. Condon said, well, perhaps Mrs. Tony could have said 'yes' that's exactly what happened, and I suggest that is why the government didn't call Mrs. Tony.

Again, this comment and the other comment are not so persistent and pronounced such as to have a probable accumulative effect on the jury which cannot be disregarded as inconsequential. See *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972). As this court in *United States v. Hysohion*, 439 F.2d 274 (2d Cir. 1971) at 277-278, quoting from *United States v. Grun-*

berger, 431 F.2d 1062, 1068 (2d Cir. 1970), comment of a prosecutor will not be considered prejudicial if the entire record revealed that there was nothing in his remarks to indicate to the jury that the prosecutor was making a "statement of beliefs that the jury was expected to understand came from the prosecutor's personal knowledge of and from the prosecutor's prior experience with, other defendants, and as such that he was speaking as an expert upon matter outside the record."

In a sense, the prosecutor was simply parroting what defense counsel said in his summation and could be considered to be fair comment upon defense argument. *United States v. Tortora, supra.* Further, neither of the statements were objected to by defense counsel and therefore those comments cannot now be claimed to constitute plain error. The failure to object not only precludes consideration of them on appeal, but indicates defense counsel's own difficulty in finding any prejudice. See *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975) and cases cited therein. See also *United States v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968).

Additionally, the prosecutor in his summation on at least two occasions (172-173, 183) advised the jury that what the attorneys say is not evidence in the case and it is the jury's recollection of the evidence that counts. Further, the court in its charge also instructed the jury to two occasions (256, 260) that what the attorneys say is not evidence in the case and argument of counsel is not evidence of the case. Under these circumstances the remarks of the prosecutor was so neutralized and attenuated as to dissipate any possible prejudice. See *e.g. United States v. Badney*, 393 F.Supp. 529, 542-543 (E.D.Pa. 1975).

These comments were within due bounds. See *e.g. United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir. 1973). Certainly, none of the comments were so prejudicial as to effect the integrity of the trial. See *United States v. Briggs*, 457 F.2d 908, 912 (2d Cir. 1972), *cert. denied* 409 U.S. 986. As this court has said so many times, a defendant is entitled only to a fair trial, not a perfect one. *United States v. Tortora, supra*, at 1207.

POINT IV

The court's charge was, in all respects, proper.

The charge on the elements of the crime was well within the bounds of the law (257-271). With respect to the under reporting of income, this court correctly charged (186, 259-260) that:

> The mere under reporting of income alone does not show willfulness, but if you find that over a period of years, there is a consistent under reporting, that may be evidence of the willfulness on the part of the defendant. This may include evidence of under reporting in prior years. You may acquit the defendant in one year, but you may consider the evidence in the following years if you find that it is pertinent to the issue.

That aspect of the charge was further explained (271) as follows:

> As I have explained to you before, however, if you find a consistent pattern of under reporting that you can consider that as *part* (emphasis added) of your determination of intent.

Those specific portions of the charge and the charge in general relating to the required proof of the elements is in accord with Devitt and Blackmar, *Federal Practice and Instructions*, Sections 52.03, 52.05, 52.07, 52.15, 52.16, 52.20 and *United States v. Coblentz, supra; United States v. Slutsky*, 487 F.2d 832 (2nd Cir. 1973), cert. denied 416 U.S. 937; *Holland v. United States, supra; United States v. Miro*, 69 F.2d 427 (2nd Cir. 1932); *United States v. Procario*, 356 F.2d 614 (2nd Cir. 1966) cert. denied 384 U.S. 1002; *Sansone v. United States, supra;* and *United States v. Fahey, supra.*

On the question of proof of under reporting of income alone, the court made its charge abundantly clear when it charged the jury (270-271) that:

> It is further important that the Government establish intent by evidence *independent* [emphasis supplied] of the understatement of income. The mere fact that there may be an understatement and it may be substantial is not sufficient to find the defendant guilty on those facts alone.

The charge, on balance, follows the letter and spirit of the law. In any event, the trial judge has wide latitude in the giving of his charge and so long as the charge sufficiently covers the facts of the case and is correct, he has satisfied his duty. See *Harris v. United States*, 367 F.2d 633 (1966), cert. denied 386 U.S. 915; *United States v. Gurule*, 437 F.2d 239, cert. denied and *Baker v. United States*, 403 U.S. 904. Here, the court satisifed his duty.

Conclusion

In considering the entire record, there was sufficient evidence to support the jury's verdict of guilty on the two counts of the indictment. The defendant was accorded a fair trial. The judgment appealed from should, therefore, be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Office and Post Office Address,
502 United States Courthouse,
Buffalo, New York 14202.

Roger P. Williams,
Assistant United States Attorney,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

RE: United States of America
vs
Florian Kazmierczak

76-1394

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 8th day of November, 19 76 I mailed ____ copies of a printed Appellee Brief in the above case, in a sealed, postpaid wrapper, to:

10 copies (by Air Mail, Special Delivery) to:
A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Condon, Klocke, Andre, Gervase & Sedita
Att: John W. Condon, Jr., Esq.
1440 Rand Building
Buffalo, New York 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Roger P. Williams, Asst. U.S. Attorney

502 U.S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

8th day of November, 19 76

Rebecca A. Lacey

REBECCA A. LACEY
NOTARY PUBLIC, State of NY, Genesee County
My Commission Expires March 30, 19 77